RECENT AMERICAN DECISIONS.

U. S. Circuit Court, District Oregon.

MILTON R. ROBERTS *v.* RICHARD KOEHLER, RECEIVER OF THE OREGON AND CALIFORNIA RAILWAY.

The fare paid by a passenger to a carrier includes the transportation of his baggage; and the carrier has a lien thereon for the fare, and may detain the same until payment thereof.

R. purchased an unconditional ticket for a passage on the O. & C. Railway from Portland to Ashland, and after his ticket had been taken up by the conductor, stopped over at Grant's Pass without his consent, leaving his baggage, consisting of a large valise, to be carried on to Ashland, where it was taken charge of by the employees of the road; on the next day R. got on the train to Ashland but refused to pay the fare thereto, $1.79; when the conductor allowed him to remain on the train, but refused to deliver him his valise at Ashland until he paid the additional fare: *Held*, that the journey from Portland to Ashland was performed under one contract, modified by the action of R. in stopping over, whereby he incurred an additional charge for his transportation, for which the carrier had a lien on the baggage so long as it remained in his possession.

Edward B. Watson, for the plaintiff.

Earl C. Bronaugh, for the defendant.

DEADY, J.—This action was brought against the defendant, the receiver of the Oregon and California railway, to recover damages for alleged maltreatment of the plaintiff, while travelling on the road between Portland and Ashland, Oregon.

The cause was tried with a jury, who gave a verdict for the defendant; and is now before the court on a motion for a new trial. It appeared on the trial that the plaintiff purchased from the defendant a combination ticket from Portland to San Francisco, where he resided, and started on the south-bound O. & C. train, on July 13th 1885; that about 200 miles south of Portland the conductor cut off from said combination ticket and took up the coupon entitling the plaintiff to transportation on the railway between Portland and Ashland, a distance of about 300 miles, and gave him his private check for future identification; that at Grant's Pass, a station some miles south of Roseburg, the plaintiff was left behind, and a large leather valise belonging to him was carried on the train to Ashland.

The next passenger train going south passed Grant's Pass in the evening of July 14th, and the plaintiff got on the same, when the conductor, in obedience to the rules of the company, demanded his fare to Ashland ($1.79), which the plaintiff refused to pay, alleging

that he had paid his fare once and had been left behind by the misconduct of the conductor on the train of the day previous; to which the conductor replied that he would give him a receipt for the payment, and if his statement proved correct the money would be refunded to him. The plaintiff still refused to pay and suggested to the conductor that he might put him off the car, to which the latter replied that he would hold his valise for the fare. When the train arrived at Ashland the plaintiff attempted to take his valise out of the office where it had been deposited the day before, which the conductor resisted, and with the aid of a brakeman finally prevented.

The plaintiff in his testimony attributed his being left at Grant's Pass to the misconduct of the conductor, in starting the train without warning and without waiting the usual time. But on the whole evidence it was so manifest that his testimony was grossly and wilfully false in this respect, and that he was left in consequence of his own wilfulness in leaving the train just as it was about to start, and after he was warned of the fact, and going some distance from the track to get something to eat, that his counsel abandoned the claim for damages on that account before the jury, and only asked a verdict for the alleged mistreatment of the plaintiff at Ashland in the struggle for the possession of the valise.

The court instructed the jury that if they believed the plaintiff's statement about the affray at Ashland, arising out of his attempt to possess himself of the valise, they ought to find a verdict for him; but if they did not believe it, and were satisfied that the conductor used only such force as was necessary and proper to prevent the plaintiff from taking the valise out of the possession of the defendant without first paying the extra fare, they ought to find for the defendant.

In this connection the court also instructed the jury that under the circumstances the defendant had a lien on the plaintiff's valise for his fare from Grant's Pass to Ashland, on July the 14th, and therefore the conductor had a right to retain the possession of the same until such fare was paid.

To this latter instruction counsel for the plaintiff then excepted, and now asks for a new trial on account thereof.

A carrier of passengers is responsible as a common carrier for the baggage of a passenger, when carried on the same conveyance as the owner thereof. The transportation of the baggage and the risk

incurred by the carrier is a part of the service for which the fare is charged: *Hollister* v. *Nowlen*, 19 Wend. 236; *Cole* v. *Goodwin*, Id. 257; *Powell* v. *Myers*, 25 Id. 594; *Merrill* v. *Grennell*, 30 N. Y. 609; *Burnell* v. *N. Y. Cent. Ry.*, 45 Id. 186; Thomp. Car. Passengers 520, sect. 8; Story on Bail., sect. 499.

Correspondingly, a carrier of passengers has a lien on the baggage that a passenger carries with him for pleasure or convenience: Overton on Liens, sect. 142; Thomp. Car. Passengers 524, sect. 11: Angell on Car., § 375: 2 Rorer on Rys. 1003, sect. 11. But this lien does not extend to the clothing or other personal furnishings or conveniences of the passenger in his immediate use or actual possession: *Ramsden* v. *Boston & Albany Ry.*, 104 Mass. 121.

A ticket for transportation on a railway between certain termini, which is silent as to the time when or within which it may be used, does not authorize the holder to stop over at any point between such termini and resume his journey thereon on the next or any following train. The contract involved in the sale and purchase of such a ticket is an entire one and not divisible. It is a contract to carry the passenger through to the point of his destination as one continuous service, and not by piecemeal, to suit his convenience or pleasure: 2 Rorer on Rys. 971, sect. 10; 2 Wood's Ry. Law, sect. 347; *Cleveland, &c., Ry.* v. *Bartram*, 10 Ohio St. 457; *Drew* v. *C. P. Ry.*, 51 Cal. 425.

Admitting these legal propositions, counsel for the plaintiff insists that the defendant had no lien on the valise in question, and therefore no right to retain it. And in support of this proposition he ingeniously argues that the journey from here to Ashland was divided into two distinct parts—one from Portland to Grant's Pass on July 13th, for which his fare was paid to Ashland, and on which the valise went through to that point; and one from said Pass to Ashland, on which, although no fare was paid yet no baggage was carried.

Before considering this proposition it is well to remember that the undertaking of the company to transport this valise, as baggage, was only incidental to the principal undertaking to carry the owner thereof, and when the latter was performed or discharged the former was also. Therefore, if the journey in reference to which the defendant undertook to carry the same, ended, by the act of the plaintiff, at Grant's Pass the carriage of the valise from there to Ashland on the same train was an additional service performed for

him, for which the defendant was entitled to an additional compensation as the carrier of so much freight, and had a lien thereon for the same; for a traveller is not entitled to have his personal baggage carried in consideration of the fare paid by him, unless it is on the same train which carries him: Thomp. Car. Passengers 521, sect. 8.

But, in my judgment, the transaction must be regarded, for the purpose of this question, as one journey, in the course of which the plaintiff incurred an additional charge of $1.79 for transportation. In effect, the plaintiff paid his fare to Ashland on the train of July 13th, with the privilege of stopping over at Grant's Pass and finishing the journey on the next day's train on the payment of the extra charge of $1.79. He saw proper to avail himself of this privilege, and thereby became indebted to the defendant accordingly. And whether the plaintiff allowed his baggage to be carried through on the first train or kept it with him, the defendant had a lien on it for all the unpaid charges for transportation which the plaintiff incurred during the journey. There was but one contract for the transportation of the plaintiff, including his baggage, which was modified or altered in the course of its performance by his own act or omission.

Suppose there were first and second-class carriages on this road, and on July 13th the plaintiff paid his fare and took passage in one of the latter for Ashland, but, arriving at Grant's Pass he got into one of the former and rode to Ashland, refusing to pay the additional fare, when demanded—can there be any doubt that the defendant would have a lien on his baggage for the same, and might, if he had or got possession of it, retain it until such fare was paid? Certainly not.

Substantially, this is the parallel of the plaintiff's case. The defendant was clearly in the right in detaining the valise until the fare was paid, and the plaintiff was as clearly in the wrong in attempting to take it without doing so. Indeed, his conduct throughout this transaction looks very much like he was playing a game to involve the defendant in a lawsuit, out of which he might make some money.

The motion for a new trial is disallowed.

We have read this case with much interest; and upon such consideration as we have been able to bestow upon it, are unable to coincide with the conclusion therein stated. While it is true that the fare paid by a passenger to a carrier includes the transportation of his baggage, and that the carrier has a lien thereon for the fare and may detain the same until the payment thereof (*Wolf* v. *Summers*,

2 Camp. 631 ; Story on Bail., sect. 604 ; Hutchinson on Car., sect. 719), in our judgment the principal case is not a proper one for the application of this rule. This lien of the carrier, is only a particular and specific lien, as distinguished from what is known as a general lien : Hutchinson on Car., sect. 477. It will be conceded that the owner of the baggage must stand in the relation of passenger to the carrier in order to fix upon the latter liability as a carrier of baggage ; the carriage of baggage is *ex vi termini* incidental to the carriage of the owner as a passenger ; if, therefore, that which would have been properly baggage had it been accompanied by the owner as a passenger, should by accident or mistake be accepted by the carrier for transportation without being accompanied by the owner, and when he is not or does not become a passenger, the carrier would not have it in his custody in the character of baggage and would not be responsible for it as such : Hutchinson on Car., sect. 701 ; *The Elvira Harbeck*, 2 Blatch. 336 ; *Collins* v. *Rd.*, 10 Cush. 506 ; *Fairfax* v. *Rd.*, 37 N. Y. S. C. 516, and 40 Id. 128 ; s. c. 67 N. Y. 11.

In the case of *Collins* v. *Rd.*, *supra*, the agent of the carrier inquired, when the goods were offered as baggage by the owner, whether he intended to accompany them ; and upon his answering that he did, the goods were accepted. The owner, however, went upon a subsequent train ; the goods were stolen before the arrival of the owner ; in delivering their opinion the court, per DEWEY, J., said : "It is easy to perceive that the omission of the plaintiff to accompany them, as he informed the defendant's agent he should, contributed materially to the loss, as that which might have been a very proper and suitable disposition of them at the station at Lawrence, under the reasonable belief that the owner of them was present to take charge of them, might have been one of hazard and exposure to loss in his absence." It was accordingly held that the carrier was not liable. It should be remembered, however, that where the relation of carrier and passenger exists, it is not necessary that the passenger should travel upon the same train with the baggage. Thus, where the passenger having purchased a ticket over the defendant's road cannot procure his baggage in time for transportation upon the same train with him, and the agent of the road thereupon agrees to forward it by the next train, the railroad in such case assumes the ordinary liability of a carrier for baggage of the passenger on the same train : *Warner* v. *Rd.*, 22 Iowa 166. If, however, the baggage is left behind by the passenger in the absence of any agreement as to its subsequent carriage, and it is subsequently transported by the carrier, it will, it seems, be carried as freight, not as baggage : *Wilson* v. *Ry.*, 57 Me. 138 ; *Graffan* v. *Rd.*, 67 Id. 234.

It is held also that the passenger may allow his baggage to precede him to its destination while he lies over upon the route ; and in such case the carrier must safely keep the baggage at the end of the route until he calls for it or until the lapse of a reasonable time ; and until the lapse of such time the carrier is liable as a common carrier : *Logan* v. *Ry.*, 11 Rob. (La.) 24 ; *Chicago, &c., Rd.* v. *Fairclough*, 52 Ill. 106 ; Pierce's Rd. L. 499 ; Hutchinson on Car., sect. 706.

It may also be considered as settled that, as stated by the court in the principal case, a ticket between certain termini which is silent as to the time of user, does not authorize the holder to stop over at any point between such termini and resume his journey thereon on the next or any following train. The contract involved in the sale and purchase of such a ticket, is an entire one and not divisible ; it is a contract to carry the passenger through to the point of his destination as one continuous service, and not by piecemeal to suit his convenience or pleasure. Besides the authorities cited

by the court, see, also, *Oil Creek Ry.* v. *Clark*, 72 Penn. St. 231; *Churchill* v. *Rd.*, 67 Ill. 390; *McClure* v. *Rd.*, 34 Md. 532; *Cheney* v. *Rd.* 11 Met. 121; *State* v. *Overton*, 24 N. J. Law 435.

It has been held that where the passenger has paid his fare and engaged a particular seat in a stage-coach, the carrier cannot dispose of the place upon the passenger's not appearing at the outset of the journey to take it, but must hold it for him; and the passenger may take the seat at any stage of the journey: *Ker* v. *Mountain*, 1 Esp. 27.

The principles above stated seem clear; indeed, none of them are controverted by the court in the principal case. In the application of them, however, to the principal case, it seems to us that the argument of the counsel for the plaintiff is conclusive. It must be conceded, we think, that it was not within the power of the railroad company to compel the plaintiff to continue a passenger throughout the whole extent of the trip; the railway company, as it seems to us, had no just cause of complaint that it was not called upon to perform all that it was legally compellable to do under its contract with the plaintiff. It must be conceded, however, that when the plaintiff resumed his journey, he entered into a new relation with the carrier and was therefore liable for the payment of fare from the point where he resumed his journey to his destination. The plaintiff's contention with the company at this point was, that he should be carried without the payment of additional fare; this claim was denied by the company, who rightfully claimed that the service performed was an additional service under a distinct contract; if this service was an additional service under a distinct contract under which the carrier was entitled to additional compensation, it follows as a matter of course, that there was no lien upon the baggage of the plaintiff for such carriage, for the reason that the carrier's lien is, as we have stated, a particular and not a general lien; and, because the contracts were distinct, if the baggage had been transported by the company upon the same train upon which the residue of the plaintiff's journey was performed, there would be no doubt as to the existence of the lien claimed. The statement of the court, however, that the transaction must be regarded for the purpose of this question, as one journey, in the course of which the plaintiff incurred an additional charge of $1.79 for transportation, does not seem to be consistent with the above conclusions. The railroad company had a right, if it saw fit, to waive its right to insist that the carriage should be continuous; but it could not at the same time waive its rights and insist upon them. If the carriage of the plaintiff to his destination is to be regarded as a carriage under the original contract, the railway company clearly was not entitled to any further compensation; if, on the other hand, it is regarded as a separate and distinct contract, which it must be conceded to be, since the railway company has so treated it by demanding additional compensation, then the carriage was not performed under the original contract but under a new contract, and in such case it seems to follow that the particular lien which the law gives to the carrier upon baggage transported by the same train, cannot be made a general lien so as to secure the fare due from the passenger upon another contract.

These propositions seem to us to be conclusive, and we cannot but think the case was erroneously decided.

M. D. EWELL.

Chicago.